Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-1842 and 86-1998

# In the Supreme Court of the United States

OCTOBER TERM, 1987

ISMAEL FELIPE ARNAIZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

NELSON BACALLAO AND STEPHEN FROMM, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

## QUESTION PRESENTED

Whether the district court properly declared a mistrial because of improprieties committed by the government and the defense.

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (86-1998 Pet. App. 1-13) is unreported.[1]

### JURISDICTION

The judgment of the court of appeals was entered on January 5, 1987. A petition for rehearing in No. 86-1842 was denied on March 5, 1987, and the petition in that case was filed with this Court on May 4, 1987. A petition for rehearing in No. 86-1998 was denied on April 14, 1987, and the petition in that case was filed with this Court on June 12, 1987.

[1] "Pet. App." refers to the appendix to the petition in No. 86-1998 unless otherwise indicated.

## STATEMENT

In an indictment returned in the United States District Court for the District of Arizona, petitioners and 21 co-defendants were charged with various controlled substance and currency violations. The charges related to petitioners' participation in a conspiracy to import and distribute cocaine, methaqualone, and marijuana. All three petitioners were charged with conspiracy to import those substances, in violation of 21 U.S.C. 963, and conspiracy to distribute them, in violation of 21 U.S.C. 846. Additionally, petitioner Arnaiz was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. (& Supp. III) 848; two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); interstate travel to promote a narcotics business, in violation of 18 U.S.C. 1952; two counts of using a telephone to facilitate the commission of a narcotics offense, in violation of 21 U.S.C. 843(b); failure to file a currency transaction report, in violation of 31 U.S.C. 5313; and conspiracy to defraud the Internal Revenue Service, in violation of 18 U.S.C. 371.

1. At the trial of petitioners and six of their co-defendants the government presented evidence that, between May 1980 and March 1984, petitioners and their co-defendants participated in a large-scale conspiracy to import cocaine, marijuana, and methaqualone into the United States and to distribute those substances.[2] Petitioner Arnaiz was alleged to be the ringleader of the operation, and co-defendants Moya and Rodriguez were alleged to be his lieutenants. One of petitioners' principal defenses was that the evidence failed to demonstrate the existence

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[2] Two of the co-defendants, Alfredo Moya and Alfonzo Rodriguez, have previously filed petitions for a writ of certiorari, which are now pending before the Court. See *Moya* v. *United States*, No. 86-6591; *Rodriguez* v. *United States*, No. 86-6637.

of the broad conspiracy charged in the indictment. At most, the defense maintained, the evidence showed that various defendants participated in smaller importation conspiracies during the relevant period and that, as the result of an October 22, 1981, dispute, a group of the defendants severed their ties with the Arnaiz organization and engaged in their own drug smuggling activities.

As part of its case, the government presented evidence that in May 1982, Rodriguez and several others flew from Florida to Arizona to find landing strips to use in connection with petitioner Arnaiz's smuggling operations (5/1/85 Tr. 17-31). The defense maintained that those activities were not conducted on behalf of the Arnaiz organization but on behalf of a separate narcotics-smuggling organization run by one Hector Barona.

Shortly before the trial was to conclude, the prosecutor produced an affidavit that a Marion County, Florida, sheriff's deputy had executed in connection with a wiretap application for Barona's telephone. The affidavit, which had been in the possession of the DEA agent conducting the investigation, stated that the Florida sheriff's investigation had revealed that on May 13, 1982, Jay Betencourt, an employee of Barona's, met with Rodriguez and others in Tucson, Arizona, for the purpose of locating a suitable airstrip in southern Arizona to use for importing drugs (5/15/85 Tr. 195-196). The district court found that the failure to furnish the affidavit to the defense constituted a violation of *Brady* v. *Maryland,* 373 U.S. 83 (1963), because the affidavit suggested that the participants in the expedition were involved with the Barona organization rather than the Arnaiz organization. The court concluded, however, that the violation was not committed in bad faith, since the prosecutor had not been aware of the existence of the document earlier (5/15/85 Tr. 283-285; 5/16/85 Tr. 1-3).

The trial court also found that a second *Brady* violation had occurred as a result of the government's failure to furnish the defense, prior to the last day of trial, with an FBI report reflecting that an informant had described co-defendant Rodriguez in a manner inconsistent with his actual appearance (5/15/85 Tr. 280-282). Again, however, the court concluded that the violation was "probably just [a] good faith mistake[ ]" (Pet. App. 3).

In addition to the *Brady* violations, the trial judge ruled that the government had violated the Jencks Act, 18 U.S.C. 3500, as a result of its failure to furnish the defense with a tape-recorded summary of an interview with a government witness. Prior to trial, that summary had been lost. Pet. App. 3-4.

Finally, the trial judge found that, on several occasions, government witnesses violated the court's sequestration order by discussing their testimony with other witnesses. One incident, which resulted in the dismissal of charges against co-defendant Gregory Clifford, occurred when FBI agents, who had been called to testify on Clifford's behalf, discussed their testimony among themselves (5/13/85 Tr. 11-26, 105-106). Another incident occurred when, following his testimony, the DEA case agent telephoned the Marion County, Florida, deputy sheriff who executed the wiretap affidavit. The DEA agent informed the deputy sheriff that she would probably be questioned concerning information contained in the affidavit. He also told her that, while he was being cross-examined by the defense, he had learned that a government informant may have murdered two Americans in Mexico (5/15/85 Tr. 204, 208).

The violations of the trial judge's sequestration order and the failure to furnish *Brady* material prompted counsel for petitioners to move for dismissal of the charges (see, *e.g.*, 5/3/85 Tr. 4; 5/13/85 Tr. 66-67). Counsel for petitioner Bacallao repeatedly requested that, in the alternative, the district court declare a mistrial. He

stated that, "I move for a dismissal, but in the alternative, I now move for a mistrial. * * * I'd take a mistrial because I want[] a clean, untainted jury. Now I'm going to have a real mess on my hands. I want a new jury. * * * I want a jury who is going to hear untainted things." 5/13/85 Tr. 74; see *id.* at 75 ("I will gladly take a mistrial so I can come back here again"); *id.* at 107 ("[Y]ou've got to give me another jury, Judge"). Counsel for the remaining petitioners did not dissociate themselves from the mistrial requests even though the district court had stated at the outset of the trial that the motion of any defense attorney would be imputed to the co-defendants unless they indicated otherwise (4/18/85 Tr. 177).[3]

Ultimately, the trial judge granted the motions for a mistrial. He explained that the mistrial declaration was based upon the *Brady* and sequestration order violations (5/16/85 Tr. 2-4). Although counsel for petitioner Fromm stated that dismissal was the proper remedy, the remaining petitioners voiced no disagreement with the mistrial declaration (*id.* at 11).

Petitioners then filed motions to dismiss the indictment on double jeopardy grounds. The district court denied the motions following a hearing. Pet. App. 2-3. In the course of the hearing, the trial judge stated that he had declared the mistrial on the specific ground "that there was a manifest necessity" (*id.* at 2) to do it. He found the mistrial necessary because of the Jencks Act and *Brady* violations by the government and because of the improper communications between government witnesses. As an additional reason for the mistrial declaration, the court cited

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[3] Throughout the proceedings petitioners and their co-defendants repeatedly made motions for a mistrial (see Gov't C.A. Br. 25 n.5). During a post-trial hearing, the district court observed that the defendants "moved for more mistrials than a computer could keep track of" (*id.* at 22) and that "[t]here have been so many motions for mistrial, that after a while you become dulled to them" (1/13/86 Tr. 47).

repeated instances of improper comments and heckling by defense counsel, particularly counsel for petitioner Bacallao (1/13/86 Tr. 47-48). Summarizing his reasoning, the trial judge explained that "I just felt under the circumstances that in fairness to everybody, including both the Government and the defendants, that it was necessary to grant a mistrial" (1/13/86 Tr. 47-48).

2. The court of appeals affirmed. It held that although the matter was not free from doubt, the district court exercised sound discretion in declaring a mistrial on the basis of manifest necessity (Pet. App. 6). That action, the court reasoned, was warranted because of the district court's inability to cure the prejudice resulting from the government's *Brady* violations and the witnesses' failure to adhere to the sequestration order. In addition, the court observed that misconduct by defense counsel "contributed to the manifest necessity for a mistrial" (Pet. App. 9).

## ARGUMENT

Petitioners contend (86-1842 Pet. 18; 86-1998 Pet. 16) that the district court abused its discretion by declaring a mistrial on the basis of manifest necessity and that, as a result, the Double Jeopardy Clause forecloses their retrial. That claim was properly rejected by the court of appeals and does not merit further review.[4]

In the first place, absent intentional misconduct by the government that is calculated to induce a mistrial, the Double Jeopardy Clause does not bar a retrial where the defendant elects to terminate the proceedings by requesting a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). This principle applies not only where the defendant expressly requests a mistrial, but also where consent to the termination of the proceedings is implicit from the circum-

[4] The petitioners in Nos. 86-6591 and 86-6637 raised substantially the same issues. We reiterate the arguments that we made in our responses to those petitions.

stances or where the defense accedes to a mistrial declaration by failing to object. See, *e.g., United States* v. *Buljubasic,* 808 F.2d 1260, 1265 (7th Cir. 1987), petition for cert. pending, No. 86-1608; *United States* v. *Smith,* 621 F.2d 350, 352 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981); *United States* v. *Gordy,* 526 F.2d 631, 635 n.1 (5th Cir. 1976); *United States* v. *Beckerman,* 516 F.2d 905 (2d Cir. 1975); *United States* v. *Goldstein,* 479 F.2d 1061, 1067 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

Throughout the trial, petitioners repeatedly requested that the proceedings be terminated by a mistrial declaration. When the violation of the court's sequestration order by a government witness was revealed, counsel for petitioner Bacallao expressly requested a mistrial (5/13/85 Tr. 74-75). The other petitioners did nothing to dissociate themselves from that motion, although the trial judge had earlier stated that, absent an expression of disagreement, he would consider any motion of one defendant to be adopted by the rest. Additionally, when the trial judge announced that "the motion for a mistrial is granted," counsel for petitioners Arnaiz and Bacallao lodged no objection to the declaration, although counsel for petitioner Fromm argued that the court should have gone farther and dismissed the charges altogether (5/16/85 Tr. 11). No petitioner expressed the desire to continue with the trial before the jury that had been empanelled, rather than having a mistrial. Under these circumstances, where the defendants have sought or acquiesced in the mistrial, where no defendant has asked to have the trial continue before the same jury, and where there is no showing of any intentional governmental misconduct designed to goad the defense into seeking a mistrial, the Double Jeopardy Clause does not bar a retrial. See, *e.g., United States* v. *Buljubasic,* 808 F.2d at 1265.

Even if petitioners had not acquiesced in the mistrial

declaration,[5] the Double Jeopardy Clause still would not preclude a retrial. When a mistrial is required by manifest necessity, the Constitution's protection against double jeopardy does not bar a retrial, even if the defendant opposes the mistrial declaration. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Moreover, because the trial judge is the "most familiar with the evidence and the background of the case on trial," his decision to declare a mistrial is entitled to great deference, and is not subject to reversal on appeal unless he acts "irrationally or irresponsibly." *Arizona* v. *Washington*, 434 U.S. 497, 514 (1978).[6]

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[5] Petitioners Bacallao and Fromm (86-1998 Pet. 8-10) maintain that, because the trial judge had earlier threatened to dismiss the case if there were further violations of the sequestration rule, his mistrial order, following a subsequent violation, was "functionally indistinguishable from a dismissal with prejudice," as opposed to a mistrial. The trial judge, however, made it plain that he did not intend to terminate the proceedings and that he contemplated that the defendants would be subject to retrial (5/16/85 Tr. 4-11). As the Court explained in *Lee* v. *United States*, 432 U.S. 23, 30-31 (1977), even if a court does not call its order a mistrial declaration, an order terminating a trial should be considered as such unless the order "contemplates an end to all prosecution of the defendant for the offense charged."

[6] Petitioners maintain (86-1842 Pet. 20; 86-1998 Pet. 10-14) that, because the government was responsible for the errors that triggered the mistrial declaration, the court of appeals erred in applying an abuse of discretion standard in assessing the propriety of the district court's order. As this Court explained in *Washington*, 434 U.S. at 513 (citation omitted), however, "[t]he adoption of a stringent standard of appellate review in this area * * * would seriously impede the trial judge in the proper performance of his 'duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop * * * professional misconduct.' " Nothing in *Washington* suggests that a deferential standard of review is inapplicable to cases involving improprieties on the part of the government, as long as the government's conduct is not calculated to harass or achieve a tactical advantage over the accused or to trigger the termination of the proceedings.

In this case, the trial judge determined that, in view of errors by government investigators, as well as misconduct by defense counsel, neither side could receive a fair trial. On the one hand, the court found that the belated disclosure of *Brady* and Jencks Act materials, coupled with the violations of the sequestration order, irreparably compromised the defendants' ability to pursue their defenses and to exploit material that could have impugned the veracity of government witnesses. On the other hand, the court determined that the government's right to a fair trial was infringed as the result of improper comments by defense counsel. Under these circumstances, a mistrial declaration, based upon manifest necessity, was well within the district court's discretion.[7] See, *e.g., Arizona* v. *Washington, supra* (approving mistrial declaration based upon defense counsel's improper and prejudicial remarks during his opening statement).[8]

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See *id.* at 508; see also *United States* v. *Jarvis*, 792 F.2d 767, 769 (9th Cir. 1986), cert. denied, No. 86-135 (Oct. 6, 1986) (strict scrutiny standard applies when the defense claims that the mistrial was *intentionally* caused by the prosecution). In this case, the courts below concluded that the government's errors were unintentional. See Pet. App. 7.

[7] Petitioners Bacallao and Fromm maintain (86-1998 Pet. 14-16) that the manifest necessity standard for a mistrial declaration should be inapplicable in this case as the government had argued at trial that manifest necessity did not require termination of the proceedings. But as the Court explained in *Washington*, 434 U.S. at 516 (footnote omitted), the determination whether to declare a mistrial on the basis of manifest necessity rests with the sound discretion of the trial judge and not the parties. "Neither party has a right to have his case decided by a jury which may be tainted by bias * * *."

[8] Petitioner Arnaiz maintains (86-1842 Pet. 22-24) that the decision of the court below is contrary to *United States* v. *Smith*, 621 F.2d 350 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981), and *United States* v. *McKoy*, 591 F.2d 218 (3d Cir. 1979), which hold that, prior to declaring a mistrial on the basis of manifest necessity, the trial judge must consider reasonable alternatives. The trial judge did, however, consider and reject as insufficient less drastic alternatives before he

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1987

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declared the mistrial. He stated that, although he had been able to cure a sequestration order violation in another case by limiting a witness's testimony, he did not believe that such a remedy would be effective here (5/16/85 Tr. 3-4). In any event, as the Court emphasized in *Washington*, 434 U.S. at 511, the fact that other district courts might have selected a remedy short of a mistrial declaration is not a basis for finding that the district court in this case abused its discretion in determining that a mistrial declaration was the only remedy sufficient to assure a fair trial.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40444